

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LONG BEACH UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2013120124

DECISION

Long Beach Unified School District (District) filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on December 2, 2013, naming Student. The matter was continued for good cause on December 20, 2013.

Administrative Law Judge Elsa H. Jones heard this matter in Long Beach, California, on February 18 through February 19, 2014.

Cynthia A. Yount, Attorney at Law, represented District. Angela Suttles, Special Education Administrator for the District, attended the hearing on behalf of District.

No representative of Student or his parents appeared at the hearing.

Sworn testimony and documentary evidence were received at the hearing. A continuance was granted for the parties to file written closing arguments and the record remained open until February 28, 2014. Upon timely receipt of the written closing arguments on February 28, 2014, the record was closed and the matter was submitted for decision.

ISSUE

Did the Individualized Education Program (IEP) dated September 26, 2013 offer a free appropriate public education (FAPE) to Student in the least restrictive environment (LRE)?

SUMMARY OF DECISION

District contends that the September 26, 2013 annual IEP, which offered Student placement in a special day class at Prisk Elementary School (Prisk), his elementary school of residence, was an appropriate placement for Student. Student's eligibility category for special education was Other Health Impaired (OHI), based upon his diagnosis of attention-deficit hyperactivity disorder (ADHD), combined with allergies and asthma. District's IEP offer of September 26, 2013, was based upon Student's low academic achievement as compared with his higher cognitive ability. District attributed this discrepancy to Student's numerous tardies and absences from school during the previous school years, through and including the time of the subject IEP. Father, with whom Student lived, attributed some of those absences and tardies to Student's allergies and asthma, however many of them were unexcused. Indeed, Student was enrolled in the District at all relevant times, but he did not attend school from January 18, 2013, through the time of the hearing, and there was no evidence that he had any health difficulties that would prevent him from attending school.

The September 26, 2013 IEP offered a program that was identical to the program in Student's previous triennial IEP, dated October 1, 2012, to which Father had consented. The September 26, 2013 IEP offered the same program because Student's lack of attendance at school after the October 1, 2012 IEP was developed prevented him from making progress in his program. Father did not attend the properly noticed September 26, 2013 IEP meeting and he was given notice of, but did not attend, the rescheduled IEP meeting in November 2013. Father did not consent to the September 26, 2013 IEP.

District complied with the procedural requirements of the applicable law in developing the September 26, 2013 IEP. The September 26, 2013 IEP was based upon the data and information that the District had at the time of the IEP, and it was reasonably calculated to provide the Student a FAPE in the LRE.

FACTUAL FINDINGS

Background and Jurisdictional Matters

1. Student is a 10-year-old boy who, at all relevant times, has resided with Father in the District. Student has been eligible for special education since December 2009, and, at that time, his eligibility category was speech and language impairment. Student enrolled in the District in September 2010, when he was almost seven years old and was repeating his second year in kindergarten. At that time, and at all relevant times thereafter, Student has attended Prisk, his home school in the District.

Student's History of Irregular School Attendance

2. Student suffered from allergies and asthma. Student's attendance at school was irregular from the time he enrolled in the District. For example, he was tardy numerous

times. Father advised the District that Student was tardy because his allergies and asthma were adversely affected by the cold morning air. In response, the District offered Student the accommodation of staying in the office before school started instead of waiting outside, but Student continued to come to school tardy anyway. He came to school tardy regardless of whether the morning air was cold or warm. Furthermore, Father did not request, and no physician ordered, any restrictions on Student's participation during recess or physical education class.

3. On those days when Student was not tardy, he was consistently absent from school. Again, Father advised the District that the absences were due to Student's health issues, and some of the absences were supported by a doctor's note. However, many of the absences were unexcused.

Triennial assessment and IEP

4. In September 2012, when Student was eight years old and in the second grade, the District performed a triennial assessment of Student, with Father's consent. At the time of the assessment, Student was enrolled in a general education class with resource specialist support, and he received speech and language services.

5. Kristi Kubiak, the District's school psychologist, performed the psychoeducational assessment and wrote the report. Ms. Kubiak testified at hearing. Ms. Kubiak has been employed by District as a school psychologist since September 1998. She received her B.A. in psychology from the University of California at San Diego. She received an M.A. in school psychology and an M.A. in counseling from Loyola Marymount University. She holds pupil personnel credentials in both school psychology and counseling.

6. Ms. Kubiak's assessment spanned three days. She did not observe Student to display any health problems during her assessment. In assessing Student, Ms. Kubiak relied on observations of Student, teacher reports, and records review. Her report summarized previous assessments of Student. An initial psychoeducational assessment conducted by the Los Alamitos Unified School District (Los Alamitos) dated December 8, 2009, reflected that Student's overall cognitive ability fell within the low average range, and that Student did not demonstrate the learning profile of a student with autistic-like behaviors. A speech and language assessment performed by Los Alamitos reflected that Student met criteria for special education as a student with a speech and language impairment. On February 20, 2012, a psychologist diagnosed Student with ADHD.

7. Ms. Kubiak administered the Wechsler Individual Achievement Test, Third Edition, (WIAT-III), the Differential Ability Scales, Second Edition (DAS-II), and the Wide Range Assessment of Memory and Learning 2 (WRAML 2). Ms. Kubiak was qualified to administer the assessments, and she administered them pursuant to the test instructions. She did not use any single criteria to assess Student, and the assessment was sufficiently comprehensive to identify Student's needs for special education and related services regardless of whether they were linked to Student's disability category. Ms. Kubiak assessed

Student in all areas of suspected disability, and the test materials were validated for the specific purpose for which they were used. Ms. Kubiak selected and administered the assessments so as not be racially, culturally, or sexually discriminatory, and they were administered in English, Student's native language.

8. Ms. Kubiak's report noted Student's history of asthma and allergies, and that he was frequently absent from school. She also noted that Student was frequently tardy. Student's teachers had reported that Student had a difficult time keeping up with the rest of the class, in part due to his frequent absences.

9. The assessments demonstrated that Student's general cognitive abilities were in the low average range, and that Student's academic achievement in reading, writing, and math was below grade level. His early reading skills fell within the significantly below average range on the WIAT-III. He had difficulty rhyming words, identifying beginning and ending sounds of words, and blending words when he was presented with the parts or letter sounds of the word. He was unable to read a first-grade level passage fluently and was unable to answer any reading comprehension questions about the passage.

10. Student's numerical operations and math reasoning skills fell within the below average range. He had not passed any of the District math facts tests. On the WIAT-III, Student had difficulty stating what time was shown on a clock, counting money, and identifying place value. Student was working below grade level in the areas of computing problems and access and solving word problems.

11. In the area of written language, Student struggled to produce any written work in class. His written language skills were at approximately the first grade level, and he attempted to use phonetic spelling.

12. Student's processing skills overall, as measured by the WRAML 2, fell into the below average range. He demonstrated a relative strength in his visual memory skills, and a relative weakness in attention/concentration skills. Ms. Kubiak concluded that his weaknesses in attention and concentration were consistent with Student's ADHD diagnosis.

13. In the area of social/behavioral functioning, Student often had a difficult time starting and completing his work on time and staying on task. Student's teacher reported to Ms. Kubiak that Student had friends at school, he socialized with peers, and he was usually respectful of peers, adults, and school rules.

14. Ms. Kubiak's report concluded that Student's difficulties in focusing, in combination with his frequent absences, impacted his academic progress at school. She considered him eligible for special education in the category of OHI. She reported that Student might benefit from placement in a smaller class with small group and one-to-one support to help him access the curriculum.

15. The triennial assessment included a health assessment prepared by Jayne Petrich, the school nurse. Ms. Petrich has been employed by the District as a nurse since 1996. She received her B.S. in nursing from California State University, Long Beach, in 1980, and her health services credential from California State University, Los Angeles, in 2001. Prior to becoming a school nurse, Ms. Petrich served as a nurse for 20 years at Long Beach Memorial Hospital, and was also employed as a home health nurse. Ms. Petrich testified at hearing.

16. Ms. Petrich was unable to perform the entire assessment since Student was absent on both days that Ms. Petrich was at Prisk for the assessment. As part of her assessment, Ms. Petrich reviewed the health and developmental history form that Father provided, as well as previous records. She relied on a previous vision and hearing screening indicating that they were within normal limits. She noted that Student had a past history of asthma, ear infections, pneumonia, and anxiety. Father's report stated that Student was taking Flovent, Singulair, Albuterol, Claritin, and Zyrtec. However, Ms. Petrich only had a doctor's order for use at school of an Albuterol inhaler. Father also indicated on the form that Student was diagnosed with autistic disorder, ADHD, moderate to severe allergies, cold-air induced asthma, and cystic fibrosis, that Student had borderline intellectual functioning, and that he sometimes had social problems with older children. Ms. Petrich requested that Father provide documentation regarding the diagnosis of cystic fibrosis, but District never received any such documentation. District also had no medical diagnosis of an autism spectrum disorder.

17. District also assessed Student in speech and language. The consent to assessment signed by Father stated that the assessment would be administered by a speech and language pathologist, but there was no evidence as to who administered the speech and language assessment, or as to the specific instruments used.

18. District convened an IEP meeting on October 1, 2012, to review the assessments and to develop an educational program for Student. The IEP team included Father, a District administrator, a general education teacher, a special education teacher, Ms. Kubiak (the school psychologist), and a speech and language therapist.

19. The team noted that Student had a diagnosis of ADHD and had a difficult time staying focused and working independently. The team also referred to Student's history of allergies and asthma, which resulted in numerous absences from school. Student's general education teacher reported that Student missed instruction due to his frequent tardiness and absences, and therefore had difficulty keeping up with the rest of the class and completing his work. Student was struggling with grade level work in his current classroom. Student's teacher also reported that Student did not behave appropriately in class, in that he did not orient himself to the teacher, or follow directions. The team concluded that Student's behaviors related to his ADHD and his excessive absences significantly affected his academic performance.

20. The team reviewed Student's health status. Father reported that Student was frequently absent due to illness. Student had an inhaler at school in the past, but had no need to use it, nor had he had any asthma-related problems while at school.

21. The IEP documented Father's concern regarding Student's limited academic progress and below grade level academic levels. The team considered Student's learning strengths and preferences. Student worked best in small groups or one-on-one. He tended to perform better with visual tests.

22. Father was given copies of the psychoeducational and speech and language assessment reports, and the team reviewed the assessment results. The IEP document included a summary of the speech and language assessment report, which was presented by the speech and language therapist. The report reflected that Student had made progress in the areas of receptive and expressive language. The areas of semantics, syntax/morphology, and pragmatics were within age level expectations. Fluency was adequate. Student had a nasal vocal quality which appeared to be related to his allergies and asthma. Student had a mild articulation impairment characterized by inconsistent substitutions of a voiceless "f/th" in the final position of words in connected speech. Student could correct this impairment when prompted, but he had not consistently generalized the final position into connected speech. Correct production of this sound was emerging and this impairment did not significantly impact his academics. The speech and language therapist recommended that the parent and classroom teacher receive a word list with targeted words on it to help Student practice this sound. The therapist also recommended that the correct use of irregular past tense verbs be addressed in Student's classroom setting. The speech and language therapist also reported that Student had made great growth in his speech, and functionally Student was consistent with his same-aged peers.

23. The team developed present levels of performance and five annual goals. The goals focused on phonemic awareness, reading sight words, reading comprehension, written expression, and basic math facts. Each goal listed several methods by which progress on the goal would be measured, and the IEP form specified that parents would be regularly informed of the Student's progress on his goals by way of a written progress report which would be issued at least as often as progress reports were issued for typical children. The team determined that Student no longer qualified for speech and language services, and that his residual mild articulation impairment and occasional incorrect usage of irregular past tense words would be addressed in the classroom. Father requested assurance that Student's speech and language needs would be addressed should Student need services in the future. The speech and language therapist responded that Student would continue to be monitored. Father also reported to the team that Student had cystic fibrosis. The team requested documentation as to that diagnosis. District never received any such documentation.

24. The team designated Student as eligible for special education under the primary category of OHI and the secondary category of Specific Learning Disability. The team determined that Student would remain at Prisk, but his classroom placement would change from a general education classroom to a mild/moderate special day class, for 100

percent of his academic day, because Student needed small group instruction to access his curriculum. The IEP stated that instruction would be both individual and group, and would begin on October 2, 2012, and end on October 1, 2013. The team agreed that Student would receive accommodations and modifications to include supervised breaks during classroom and statewide testing, and that he be given extended time regarding learning math facts. Father did not dispute the assessments or their results at the meeting. Father consented to this IEP.

Student's School Attendance After the October 1, 2012 IEP

25. Pursuant to the October 1, 2012 IEP, Student was placed in the mild/moderate special day class at Prisk. Ujima Thompson was the teacher in the special day class, and she testified at hearing. Ms. Thompson received her B.A. in Communication from Southeastern Louisiana University in 1995, and her M.Ed. from National University in 2005. She holds credentials in general education and special education. She will receive her credential in administration when she has completed her field experience. She has been employed by District for over 13 years as a special education teacher. Prior to her employment with the District, Ms. Thompson was a general education teacher for five years in the Los Angeles Unified School District.

26. Student's school attendance did not improve after the October 1, 2012 IEP meeting. He continued to be tardy, often not arriving at school until just before the morning recess. In so doing, he would entirely miss first period, which was instruction in English Language Arts. Sometimes Father explained to Ms. Thompson that Student was tardy because Student did not want to wake up. Student was also frequently absent. When he returned to school from these absences, he would occasionally mention that he had been to Disneyland, or visiting his mother, or engaged in other out-of-home activities during his absence. Additionally, on days when he was absent from school, other students reported to Ms. Thompson that Student was seen at after-school events. Furthermore, he looked normal to Ms. Thompson when he returned to school after each absence, and did not look as though he had been ill. District staff received no instructions to restrict Student's activities after any of Student's absences. All of these circumstances demonstrated to the District that many of Student's absences were not due to illness.

27. When Student attended school, however, he worked on the goals in the October 1, 2012 IEP, and they were appropriate goals for him. Had he attended school more regularly, he would have met his goals. Additionally, socially he was well-liked by his classmates and had no fights or conflicts with them. Ms. Thompson did not observe Student display any autistic-like behaviors. She would have recognized such behaviors, as she has taught many pupils who exhibited autistic-like behaviors during her career.

28. Eventually, Student stopped attending school entirely. Student did not attend school in the District after January 17, 2013, through the time of the hearing. There was no evidence that Student attended school anywhere else subsequent to January 17, 2013.

29. At some point after Student ceased attending school, Father requested independent educational evaluations (IEE's). Also, in approximately April 2013, Father submitted a Home/Hospital Instruction Request form to the District, requesting home/hospital instruction for one to two years. The printed form had strike-outs without initials, and contained handwritten additions, also without initials. Father attached to the form a signed statement which limited the scope of the health information release contained on the printed form. The form bore the signature of Lori Krieger, M.D. It listed Student's diagnosis as Reactive Airway Dysfunction Syndrome, moderate to severe asthma, and moderate to severe allergies.

30. District questioned the validity of the form and the need for home hospital instruction. Briana Graham-Ramos, District's Home/Hospital Administrator, had questions regarding the Home/Hospital Instruction Request form, because the printed form had been altered, and the physician's information was typed on the form instead of handwritten. Ms. Graham-Ramos had been a special education administrator with the District for nearly seven years. She had never seen a typed Home/Hospital Instruction Request form, and she had never seen cross-outs on such a form. These variances raised her suspicions that the physician had not filled out the form herself. Further, Ms. Graham-Ramos had rarely seen a home hospital request for asthma, and home/hospital requests were only accepted for one year, while this request was for a longer time period. She was also concerned that Father had limited the health information release that accompanied the form. Additionally, Ms. Thompson (Student's teacher), Patricia Ross (the school counselor) and Ms. Petrich (the school nurse) had not observed any of the symptoms of the conditions identified on the form. They could not recall any instance when Student demonstrated any sign of illness while at school.

31. On April 24, 2013, District convened an IEP meeting to discuss Father's home/hospital request and requests for IEE's, to ascertain why Student was not attending school, and to address his attendance issues. Despite the staff's misgivings regarding the accuracy and validity of the information on the Home/Hospital Instruction Request form, the District members of the IEP team were prepared to offer home/hospital instruction from April 24, 2013, to October 1, 2013, so that Student could at least receive some formal education.

32. The April 24, 2013 IEP meeting did not progress to the point of team introductions, because almost immediately upon arriving at the meeting, Father and District personnel had a dispute over the manner in which the meeting would proceed, and Father became angry and left the meeting. Before leaving the meeting, Father expressed that the duration of the home/hospital instruction District proposed would be insufficient, and he again demanded IEE's.

33. After the aborted IEP meeting, Kelly Lingel, the District's elementary school special education administrator, sent a letter to Father dated April 29, 2013. In the letter, Ms. Lingel offered Father IEE's in the areas of psychoeducational and speech and language. The letter advised Father that he could select an assessor who would assess for issues related

to hyperactivity and attention, as well as autism, and who would consider how Student's health might be affecting his educational performance. To the District's knowledge, Student never obtained any IEE's.

34. Also after the aborted IEP meeting, District initiated School Attendance Review Board (SARB) proceedings regarding Student. The SARB is a multi-agency board that meets with families to address issues regarding school attendance. Tiffany Brown, Ed.D., was the District Director of Coordinated Student Services and the Chairperson of the SARB. Dr. Brown testified at hearing. The SARB duly subpoenaed Father to appear at a SARB meeting in May 2013 regarding Student's school attendance. Just prior to the start time of the meeting, the SARB received an e-mail from Father stating that he would not attend as he did not believe that he had been properly notified of the meeting. Dr. Brown responded to Father that proper notice had been given, and encouraged him to participate in the District's efforts to obtain Student's attendance at school. Dr. Brown also requested that the Long Beach Police Department check Student's home to determine if Student was well, because District staff had not seen Student for few months. A police officer observed Student playing in the front yard of Student's home, and reported to Dr. Brown that Student appeared happy and healthy. Dr. Brown consulted with the city prosecutor, who advised her that he would not pursue the matter because Father contended that Student had health issues, and Student also had documented health conditions. Dr. Brown also spoke with Dr. Krieger, the physician who had signed the Home/Hospital Instruction Request form, and learned that Dr. Krieger had not prepared the form. In addition, during this conversation Dr. Brown learned Dr. Krieger did not make the diagnoses that were included on the form. Rather, Dr. Krieger believed that these diagnoses were made by Student's internist. Dr. Krieger provided no information to Dr. Brown that Student was unable to attend school, and Dr. Brown concluded that the Home/Hospital Instruction Request form was "completely bogus."

September 26, 2013 IEP Meeting

35. On September 10, 2013, when Student would have been in third grade had he been attending school, District sent notice to Father of an IEP meeting to be held on September 26, 2013. District convened the IEP meeting on September 26, 2013, and the attendees at the meeting were: Karin L. Bell (a third-grade general education teacher), Damon Jespersen (District Administrator), Ms. Ross (school counselor), and Ms. Thompson. Father did not attend, and, up until that time, District had not received any communication from Father that he would not be attending the meeting. When Father did not appear for the meeting, Ms. Thompson called Father to find out whether he was running late, but she received no response to her call. The meeting proceeded without Father. The IEP team generated an IEP which re-stated, in all relevant respects, the October 1, 2012 IEP, including the same present levels of performance, and the same goals, and again offering placement in the mild/moderate special day class at Prisk for the 2013-2014 school year. District decided to offer the same program as was in the October 1, 2012 IEP, because Student had attended so few school days during the 2012-2013 school year that he could not have made progress on his goals, and the team had no information that Student's present levels of performance

had changed since his October 1, 2012 IEP. The September 26, 2013 IEP also contained the same information as did the October 1, 2012 IEP with respect to such matters as modifications, accommodations, the anticipated frequency, location, and duration of services, and how frequently Father would be informed of Student's progress.

36. On September 27, 2013, the day after the IEP meeting, District received written notification from Father that he was unable to attend the meeting, and asking that it be rescheduled. Father did not suggest a date for the rescheduled meeting. On October 17, 2013, District sent Father a notice setting the IEP meeting for a date certain in November 2013, and also sent Father the September 26, 2013 IEP. Ms. Thompson followed up the notice with weekly telephone calls to Father, to attempt to obtain his signature on the IEP, and to learn whether he would attend the re-scheduled IEP meeting. Father did not respond to these telephone calls, except for one time, when he stated he had not been able to return the calls because he did not have sufficient minutes on his phone, but that he would be attending the re-scheduled IEP meeting. Father did not attend the re-scheduled IEP meeting, and did not notify the District that he would not be attending, nor did he request that the meeting be rescheduled. Because Father did not attend, the IEP meeting scheduled in November 2013 did not go forward. Ms. Thompson continued to attempt to contact Father by telephone thereafter approximately one time per week until sometime in December 2013, to attempt to re-schedule the IEP meeting, or to obtain Father's consent to the IEP, but Father did not respond to her calls. Father never consented to the September 26, 2013 IEP.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA¹

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement the IDEA and its regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.;² Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and

¹Unless otherwise indicated, the legal citations in this Introduction are incorporated by reference into the analysis of the issue decided below.

²All references are to the 2006 edition of the Code of Federal Regulations, unless otherwise stated.

conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In California, related services are also sometimes called designated instruction and services ("DIS services"). In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel. The IEP describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to [a child with special needs]." *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, the *Rowley* court decided that the FAPE requirement of the IDEA was met when a child received access to an education that was reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of

persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

Issue: Whether the IEP of September 26, 2013, offered a FAPE in the LRE

5. District contends that the IEP of September 26, 2013, offered Student a FAPE in the LRE. District asserts that it developed the IEP based upon the information it possessed regarding Student's needs at the time of the IEP meeting, and it was reasonably calculated to provide Student an educational benefit in the LRE. District contends that it had no credible or verifiable evidence that Student's health required any additional services or any different placement.

Applicable Law

6. When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204, 206-207.)

7. An assessment of a student who is receiving special education and related services must occur at least once every three years unless the parent and the school district agree that such a reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2); Ed. Code, § 56381, subd. (a)(2).) The same basic requirements as for an initial assessment apply to re-assessments such as the three-year (triennial) assessment. (20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303; Ed. Code, § 56381, subd. (e).)

8. The district must obtain informed parental consent prior to conducting an assessment or reassessment of a child with a disability. (34 C.F.R. § 300.300.) The child must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the child has a disability or whether the child's educational program is appropriate. (20 U.S.C. § 1414(b)(2) & (3); 34 C.F.R. 300.304(b)(4); Ed. Code, § 56320, subds. (e) & (f).) The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.304(b)(6).) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally, or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a), (b).)

9. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a), (b).) Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special

education local plan area.” (Ed. Code, §§ 56320, subd. (g), and 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) A health assessment shall be conducted by a credentialed school nurse or physician who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, § 56325, subd. (b).)

10. The assessor must prepare a written report that includes: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student’s academic and social functioning; (5) the educationally relevant health, development and medical findings, if any; (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (7) the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP meeting required after the assessment. (20 U.S.C. § 1414(b)(4)(B); Ed. Code, § 56329, subd. (a)(3).)

11. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA, and the IEP must include an assortment of information, including a statement of the child’s present levels of academic achievement and functional performance, and a statement of measurable annual goals designed to meet the child’s needs that result from his disability to enable the child to be involved in and make progress in the general education curriculum. The goals are based upon the child’s present levels of academic achievement and functional performance. The IEP must also include a description of how the child’s progress toward meeting the annual goals will be measured, when periodic reports of the child’s progress will be issued to the parent, a statement of the special education and related services to be provided to the child, a statement of the program modifications that will be provided for the child, and a statement of individual accommodations for the child related to the taking of state and district-wide assessments. (20 USC § 1414(d)(1)(A); 34 C.F.R. § 300.320.) An IEP must contain the projected date for the beginning of services and the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(VII); Ed. Code, § 56345, subd. (a)(7).)

12. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child’s education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.346(a).)

13. One or both of the student’s parents are considered necessary members of the IEP team. (34 C.F.R. § 300.321(a)(1); Ed. Code, §§ 56341, subd. (b); 56342.5 [parents must be part of any group that makes placement decisions].) However, an IEP need not conform to a parent’s wishes in order to be sufficient or appropriate. (*Shaw v. Distr. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an “education ... designed according to the parent’s desires”], citing *Rowley, supra*, 458 U.S. at p. 207.)

14. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4) A parent has meaningfully participated in the development of an IEP when the parent is informed of the child's problems, attends the IEP meeting, expresses disagreement with the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Ed.*, 993 F.2d 1031, 1036 [parent who had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].) An IEP meeting may be conducted without a parent in attendance if the school district is unable to convince the parents that they should attend, and the school district keeps records of its attempts to arrange a mutually agreeable time and place for the meeting. (34 C.F.R. §300.322(d).)

15. The Ninth Circuit recently considered the issue of parental participation in IEP meetings in the case of *Doug C. v. Hawaii Dept. of Ed.* (9th Cir. 2013) 720 F.3d 1038 (*Doug C.*). *Doug C.* involved a school district which held an annual IEP meeting despite the parent's last-minute inability, due to illness, to attend the meeting on the day the meeting was scheduled, and despite parent's statement that he wanted to participate in the IEP meeting. The school district held the meeting on the scheduled day because the parent was not able to definitely commit to attend the meeting on either of two other possible days upon which school district personnel were available and that were also within the deadline for holding the IEP meeting. At the meeting, the school district changed the student's placement from a private facility to a local public school. Citing title 34 Code of Federal Regulations part 300.322(d), as well as *Shapiro v. Paradise Valley Unified Sch. Dist.* (9th Cir. 2003) 317 F.3d 1072, 1078 *superseded on other grounds* by 20 U.S.C. § 1414(d)(1)(B), the court determined that the school district had committed a procedural violation of the IDEA and deprived Student of a FAPE, because parent did not affirmatively refuse to attend the meeting, nor was the school district unable to convince parent to attend. (720 F. 3d, at p. 1045.) The court also criticized the school district for prioritizing the schedules of its personnel over the attendance of the parent. (*Ibid.*) The *Doug C.* court concluded that the student was deprived of a FAPE both because parent's opportunity to participate in the IEP formulation process was seriously infringed, and because the student was deprived of an educational opportunity because the merits of the private school he had been attending received insufficient consideration at the IEP meeting.

16. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Ed.*, *supra*, 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

17. School districts are also required to provide each special education student with a program in the LRE, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular

classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code, § 56031.) A placement must foster maximum interaction between disabled students and their nondisabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code, § 56000, subd. (b).) Mainstreaming is not required in every case. (*Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1056.) However, to the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (Ed. Code, § 56040.1.) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the followed factors: “(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the student] had on the teacher and children in the regular class; and (4) the costs of mainstreaming [the student].” (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Bd. of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050].)

18. Each special education local plan area shall ensure that a continuum of program options is available for special education students. The continuum of program options shall include all, or any combination, of the following, in descending order of restrictiveness: (a) regular education programs; (b) a resource specialist program; (c) designated instructional services; (d) special day classes; (e) nonpublic, nonsectarian school services; (f) state special schools; (g) instruction in nonclassroom settings; (h) itinerant instruction; (i) instruction using telecommunication, and instruction in the home, in hospitals, and in other institutions. (34 C.F.R. § 300.115; Ed. Code §§ 56360, 56361.)

Analysis

19. The September 26, 2013 IEP was based upon the Student’s previous annual IEP, dated October 1, 2012. That IEP, which was consented to by Father, was based upon a psychoeducational, health, and speech and language assessment which were administered in September 2012. The psychoeducational and health assessments were administered appropriately and were legally sufficient.³ The psychoeducational and health assessments were administered by qualified staff knowledgeable about Student’s disabilities and competent to perform the assessments. The health assessment was administered by a qualified school nurse, and contained as much information as she could gather in view of Student’s absences, including information supplied by Father. The psychoeducational

³ There was insufficient evidence to determine whether the speech and language assessment was appropriate and sufficient. However, the speech and language assessment report was given to Father on or before the October 1, 2012 IEP meeting, and it was discussed at that meeting by a speech and language therapist. Father consented to Student’s exit from speech and language services at that meeting, and never subsequently challenged that action. Speech and language services were not mentioned in the September 26, 2013 IEP, which is the IEP at issue in this case. Therefore, whether the speech and language assessment was appropriate and sufficient is not relevant to the issue for hearing in this matter.

assessment was administered by a credentialed school psychologist. The report concluded that Student needed special education, and set forth the basis for that determination, including consideration of Student's academic and social functioning, health-related issues, and services needed. The assessment results, which were not disputed by Father at the time of the October 1, 2012 IEP meeting, demonstrated that Student had needs in phonemic awareness, reading, reading comprehension, written expression, and basic math facts. The assessment results also reflected that Student no longer required speech and language services. The assessments, including teacher observations, revealed that Student was unable to academically perform at grade level due to a combination of his ADHD and his frequent absences from school. Rather, Student required a small group environment to access his curriculum.

20. The October 1, 2012 IEP, included a statement of Student's present levels of academic and functional performance, and a statement of measurable annual goals based upon those present levels of performance that were designed to meet Student's needs in reading, writing, and math. The IEP included methods of measuring Student's progress, when reports of Student's progress would be issued to Student, a statement of the special education and related services to be provided to Student, and a statement of modifications and accommodations. The IEP contained a projected date for the beginning of services and the anticipated frequency, location, and duration of the services. The team decided to change Student's placement from general education with resource specialist services to the more restrictive placement of the mild/moderate special day class at Prisk, where District could provide a small group environment. The IEP provided placement in the special day class along with modifications and accommodations, including supervised breaks during classroom and statewide testing, and extended time regarding learning math facts. The October 1, 2012 IEP included all required information. There was no dispute but that this IEP constituted a FAPE in the LRE.

21. Student continued to be tardy or absent from school between the October 1, 2012 IEP and January 17, 2013, and he completely failed to attend school as of January 18, 2013. District had no reason to believe, at the time of Student's annual IEP in September 2013, that Student's levels of academic performance had changed, or that Student had made any progress on any of his goals in the October 1, 2012 IEP, or that Student was any less in need of a small group academic environment than he was at the time of the October 1, 2012 IEP. Furthermore, the October 1, 2012 IEP was based upon assessments that were less than one month old. In particular, the psychoeducational assessment was administered little more than a year before the September 26, 2013 IEP, and the assessment results were therefore still legally valid information upon which District could rely in formulating the September 26, 2013 IEP. Accordingly, District offered Student the same program in the September 26, 2013 IEP that it had offered Student in the October 1, 2012 IEP. Under these circumstances, the September 26, 2013 IEP was reasonably calculated to provide Student some educational benefit, and it offered Student a FAPE. Furthermore, the IEP document itself, which was virtually identical to the October 1, 2012 IEP document, similarly contained all of the required information.

22. With respect to the LRE, District had previously placed Student in a general education class with resource specialist support. The October 1, 2012 IEP changed this placement to a more restrictive special day class. Student had not made progress in the special day class due to his number of tardies and absences. However, the evidence demonstrated that Student would likely have made progress in the special day class at Prisk, had he consistently attended school during the 2012-2013 school year pursuant to the October 1, 2012 IEP. District therefore reasonably believed that Student would make progress in such a placement, that it would be appropriate for Student, and that it would constitute the LRE within the meaning of *Rachel H.* during the 2013-2014 school year.

23. This analysis is not altered by the fact that Father requested IEE's in spring 2013, and District granted the request. Father never obtained any IEE's, or effectively challenged the validity or appropriateness of the District's assessments in any manner.

24. This analysis is also not altered by Student's health conditions, as reported by Father, or by the District's decision to offer home/hospital instruction to Student from April 2013 to October 2013. First, there was no evidence that Student's health conditions affected Student's ability to access his curriculum. Second, such a restrictive placement as home/hospital instruction was not warranted by the evidence. When it considered Father's request for home/hospital instruction, District was aware that Student had not attended school as of January 18, 2013. District also was aware at that time that home/hospital instruction was probably not required by any of the health conditions Father reported with respect to Student. No District staff had observed Student having any health difficulties when he was at school, and the form and content of the Home/Hospital Instruction Request form submitted by Father were questionable. District established that it offered home/hospital instruction primarily in an attempt to compromise with Father and, at the same time, to provide at least some measure of instruction and educational benefit to Student. District's failed attempt to provide home/hospital instruction, therefore, does not support any argument that the educational program at Prisk, as offered in the September 26, 2013 IEP, was not a FAPE in the LRE.

25. Finally, District did not violate IDEA procedures in conducting the September 26, 2013 IEP meeting. All necessary people were present, except for Father. However, Father attended the October 1, 2012 IEP meeting, participated in the meeting, and consented to the IEP. On April 24, 2013, Father attended another IEP meeting which District convened to consider Father's requests for home/hospital instruction and for IEE's. Father left the meeting at its inception, but not before District attempted to address his concerns by granting his request for home/hospital instruction for a limited period of time, in order to provide instruction to Student. Several days after this aborted IEP meeting, District agreed to Father's requests for IEE's.

26. District notified Father of the IEP meeting scheduled for September 26, 2013. Prior to the meeting, Father did not request the District to reschedule the meeting, and he was not available by phone at the time of the meeting. Father had ample notice and the opportunity to participate in the September 26, 2013 IEP meeting, but he did not attend.

Instead, after the September 26, 2013 IEP meeting, he requested that it be rescheduled. District provided notice of the re-scheduled meeting. Father did not attend the rescheduled meeting, and never notified the District that he would not attend. Even after the date of the re-scheduled meeting, District continued to try to contact Father by telephone to obtain his participation, but Father did not respond.

27. This case is distinguishable from the facts in *Doug C.*, *supra*, for several reasons. First, in *Doug C.*, the parent had expressed his desire to attend the subject IEP meeting. He worked with the District to obtain a convenient date to hold the meeting, and, when he was unable to attend the meeting on that date due to illness, he objected to the District holding the meeting without him, and attempted to work with the District to find a date on which the meeting could be rescheduled. Parent then attended a rescheduled IEP meeting, at which he objected to the IEP, and then filed a request for due process hearing. Second, in *Doug C.*, the school district proceeded with the IEP meeting in parent's absence only because it wanted to hold the IEP meeting in a timely manner and not disrupt its personnel's schedules. The *Doug C.* court determined that the school district's priorities were misplaced. In contrast, in the instant case, the District's overriding concerns were not the timelines for holding an IEP meeting, or the schedules of its personnel. Rather, the District's primary concern was that the Student was not attending school, and had not attended school for nearly the entire previous semester. Third, the IEP at issue in *Doug C.* changed the child's placement from a private school to a public school, and parent's absence from that IEP meeting strongly impacted his ability to participate in the development of the IEP and of his child's educational program. In the instant matter, the IEP team changed nothing about Student's educational program, because Student had not made any progress due to his tardiness and absences. The team adopted the same program and placement that had been in place for Student in the October 1, 2012 IEP, which Father had participated in developing and to which Father had consented.

28. Under all of these circumstances, District demonstrated that it was unable to obtain Father's participation in the September 26, 2013 IEP meeting, and that Father essentially refused to attend the meeting.

Conclusion

29. District did not commit any procedural violations in developing the September 26, 2013 IEP. The assessments on which the IEP were based were legally appropriate and sufficient, and the IEP itself contained all required elements. District's development of the September 26, 2013 IEP without Father's presence at the IEP meeting did not constitute a procedural violation that would invalidate the IEP. The IEP was identical to the last agreed-upon and consented to IEP, and Student's lack of progress was due to his poor school attendance, not to any deficiency in the program offered. The IEP of September 26, 2013, offered Student a FAPE in the LRE.

ORDER

1. The IEP of September 26, 2013, offered Student a FAPE in the LRE.
2. If Student remains enrolled in the District, and returns to school, District may implement the September 26, 2013 IEP, without parental consent.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on the only issue heard and decided in this matter.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: March 25, 2014

_____/s/
ELSA H. JONES
Administrative Law Judge
Office of Administrative Hearings